also erred in declining to grant any deference to the Department's interpretation, reached after a notice and comment process, of the 1867 Agreement, the relevant treaties with the Cherokee Nation and the Delaware Tribe, and the historical background.

The court of appeals placed heavy reliance on two early cases of this Court dealing with the rights obtained by individual Delaware Indians under the 1867 Agreement. In *Cherokee Nation* v. *Journeycake*, 155 U.S. 196 (1894), this Court determined that the Delawares who had moved to Cherokee territory were entitled to share equally with Cherokees in the proceeds from the rental of certain lands. In *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127 (1904), this Court held that the land purchased pursuant to the 1867 Agreement was held by individual Delawares as life estates, and could not be inherited. Neither decision ruled on whether the Delaware Tribe had preserved its tribal organization by making the second payment contemplated under Article 15 of the 1866 Cherokee Treaty. See *Babbitt*, 117 F.3d at 1500. Accordingly, the court of appeals erred in finding that *Journeycake* and *Delaware Indians* had foreclosed the Department from finding that the payment the Delaware Tribe made for lands under the 1867 Agreement preserved its tribal organization.

2. The court of appeals made clear, however, that it was not ruling on the Delaware Tribe's alternative argument that, even if its tribal organization was lost in 1867, it was restored by later administrative and congressional actions. See Pet. App. 6a n.2. The court concluded that the Department's 1996 decision had not rested on a "restoration" theory, and the court accordingly left "for another day what effect, if any, the post-1867 legislative

and executive dealings with the Delawares had on their alleged status as a tribe." *Id.* at 6a & n.2.

There is substantial indication that, even if the Delaware Tribe relinquished its tribal organization in the 1867 Agreement, congressional and administrative actions following 1867 have restored the Delaware Tribe's status as a recognized tribe. Such a conclusion would be consistent with this Court's decision in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977). *Weeks* upheld, against an equal protection challenge, Congress's decision to distribute a claims award to the Delaware Tribe and a separate Tribe of Delaware descendants (the "Absentee Delawares") while excluding another group of Delaware descendants (the "Kansas Delawares"). The Court reasoned, *inter alia*, that the Kansas Delawares had severed their tribal relations, and, unlike the Delaware Tribe and the Absentee Delawares, were not a distinct and recognized tribal entity. *Id.* at 85-86. The Court observed with respect to the Delaware Tribe that, "[d]espite their association with the Cherokees, these Indians * * * have over the years maintained a distinct group identity, and today are a federally recognized tribe." *Id.* at 77. See also *id.* at 77 n. 8 ("it is clear that Congress * * * dealt with the Cherokee Delawares as a distinct entity").

This Court's treatment of the status of the Delaware Tribe in *Weeks* is in tension with the ruling below. At the very least, *Weeks* would be consistent with a determination that tribal status was "restored" to the Delaware Tribe subsequent to 1867.[2] Because the restora-

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[2] In dictum, the court of appeals suggested (Pet. App. 24a) that, "[a]t most, *Weeks* stands for the proposition the Delawares rec nstituted for claims purposes." Nothing in *Weeks* suggests such a limitation, and the *Weeks* majority in fact relied on a statute that recognized that the

tion question was explicitly left unresolved by the court of appeals, however, and because the case does not otherwise appear to implicate issues of broader significance concerning other Tribes, this Court's review does not appear warranted at this time.[3]

Delaware Tribe had a functioning tribal government. See 430 U.S. at 77 n.8 (citing Act of Apr. 21, 1904, Ch. 1402, § 21, 33 Stat. 222) (providing for payments to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct"); see also *id.* at 91 n.4 (Stevens, J., dissenting) ("To be sure the Cherokee Delawares have recently reconstituted themselves as a recognized Indian tribe."). In any event, the court of appeals' understanding of *Weeks* would not prevent the Department from concluding that administrative and congressional actions after 1867 reflect recognition of the Delaware Tribe's status as a distinct Tribe for all purposes.

[3] After finding that the substance of the Department's 1996 decision was contrary to this Court's rulings in *Jowa nyaka* and *Delaware Tribe*, the court of appeals briefly noted its view that the decision was procedurally deficient because the Department did not use (or waive) the federal acknowledgment procedures found in 25 C.F.R. Part 83. Pet. App. 25a. That statement misperceives the nature of the issue before the Department, which was whether to correct a 1979 determination that had revoked direct dealings with the Delaware Tribe as a distinct tribal entity. The Part 83 procedures are not designed to correct such an erroneous action. See 25 C.F.R. 83.3 (a) and (b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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